(1) Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY THOMPSON,
Petitioner,

v.

THE BUDD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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5 cpp

QUESTION PRESENTED

May the Commonwealth of Kentucky deprive its citizens of their constitutional right to redress for injuries they sustain due to the negligence of another.

PARTIES TO THE PROCEEDING

Petitioner

Anthony Thompson, Petitioner is an individual and has no corporate affiliations.

Respondent

The Budd Company, Respondent

In addition to the parties named in the caption, Liberty Mutual Insurance Company, Barton-Malow Company, Inc., Albert Kahn Associates, Inc., and Merrick Mechanical, Inc., were parties before the court of appeals.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 199 F.3d 799 (6th Cir.Ky. 1999). A copy of the Opinion is included in the Appendix at Appendix A at 1a. The Opinion of the District Court for the Eastern District of Kentucky is not published and is included in Appendix B at 26a. The Order of the District Court became final and appealable on April 6, 1998, which is printed in Appendix C at 28a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on December 9, 1999. On December 23, 1999, Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on January 11, 2000 (App. D at 37a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment XIV, section 1

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or proper, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Const. §14

All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Kentucky Const. §54

The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Pertinent sections of the Kentucky Revised Statutes, KRS §§342.610 and 342.690 (Baldwin 1997) (in relevant party) are provided in Appendix E at 39a.

STATEMENT OF THE CASE

Petitioner commenced a negligent action for the injuries he sustained while performing work for his employer, Merrick Mechanical, Inc., on the premises of the Respondent, The Budd Company. Petitioner was injured when he fell sixteen feet from a set of unguarded and unmarked equipment access doors at the Budd Company plant.

The Respondent is an automotive parts stamping company. Sometime after Respondent began its operations at the plant, it contracted with Merrick Mechanical to take care of its HVAC equipment. As part of this contract, Merrick Mechanical would change the filters on the heating and air conditioning units on the roof. The Respondent permitted Merrick Mechanical employees to store filters and filter

frames for the heating and air conditioning units on the mezzanine area level.

Petitioner was hired by Merrick Mechanical to work on a new construction project at the Respondent plant. On one particular day however, a Merrick Mechanical employee who was regularly assigned to perform the Merrick Mechanical maintenance contract with Respondent, enlisted Petitioner's aid to help him change filters and filter frames.

In the process of obtaining the replacement filters and filter frames from the mezzanine area level, Petitioner unexpectedly and unnecessarily encountered a sixteen foot drop. Petitioner fell and was rendered a quadriplegic. Petitioner's initial cause of action against Respondent was based upon Respondent's failure to provide Petitioner with an adequate and safe work environment. Respondent argued that it was immune from common law tort liability pursuant to an application of §§ KRS 342.610 and 342.690.

Taken together, the two statutes provide that a contractor who sub-contracts any part of a contract and his carrier shall be liable for payment of compensation to the sub-contractor unless the sub-contractor who is primarily liable for the payment of such compensation has secured the payment of compensation. A contractor is deemed to be one who contracts with another to perform work of a kind that is a regular or recurrent part of the work or the business. If a business is deemed to be a contractor pursuant to the definition contained in KRS 342.610, then they are afforded immunity from common law liability as provided in KRS 342.690. Respondent argued and the United States District Court agreed that the Respondent is a contractor as it is defined in KRS 3242.610 and is therefore entitled to immunity from common law tort liability pursuant to KRS

342.690 (App. E at 40a). The District Court made this decision despite the fact that Respondent did not make any workers compensation payments to Petitioner nor would it have ever been required to make those payments.

Petitioner filed a timely appeal with the Court of Appeals for the Sixth Circuit. On December 9, 1999, the Court of Appeals affirmed the District Court's judgment. Petitioner's request for an en banc review was denied on January 11, 2000.

ARGUMENT FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT'S OPINION BELOW IGNORED THE CONSTITUTIONAL IMPLICATIONS INVOLVED IN THIS MATTER.

The Court should grant this Petition because the combined effect of KRS §§ 342.610 and 342.690 limit common law tort liability in violation of sections 14 and 54 of the Kentucky Constitution and the due process clause of the U.S. Constitution.

KRS §342.610 provides, in pertinent part,

> (2) A Contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this

> chapter. . . . A person who contracts with another . . . (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

While the determination as to whether or not Respondent is a contractor as defined in KRS § 342.610 and thus entitled to immunity from common law tort liability provided contractors in KRS § 342.690 is a question of fact, the District Court made the factual determination that Respondent was a contractor against the clear weight of the evidence. The Court of Appeals subsequently agreed with this factual determination.

Respondent operates the Budd Plant in Shelbyville, Kentucky. The Budd Company is an automotive parts stamping company. In 1986, Respondent contracted with Barton-Malow, Inc., to design and build the Budd Plant. Subsequently Barton-Malow contracted with Albert Kahn & Associates to provide the design and specifications for the plant.

As part of the design of the plant, the electrical substation components were to be placed on the mezzanine level. The mezzanine level was to be accessed by a set of stairways. The mezzanine was to have been a limited access area only. To limit the access, the Respondent placed signs stating "Authorized Personnel Only" and had a metal mesh fence with a door which divided the electrical area from the stairway area. Sometime after Respondent began its operations at the plant, it contracted with Merrick Mechanical

to take care of its HVAC equipment. As part of this contract, Merrick Mechanical would change the filters on the heating and air conditioning units on the roof. The Budd Company allowed Merrick Mechanical employees to store filters and filter frames for the heating and air conditioning units on the mezzanine area level.

On the morning of November 29, 1995, Petitioner, an employee of Merrick Mechanical, reported to work and rather than work at the construction site where he was employed to work, he was enlisted by another Merrick Mechanical employee to assist in changing air filters. Petitioner went immediately to the roof, began changing the filters and sometime midmorning, ran out of the filters.

Either the filters or the filter frames were stored through a door on the mezzanine level. Petitioner observed a set of double doors and assumed that they led him to the mezzanine level. He opened the doors and fell sixteen feet to the ground. The equipment access doors, as designed and constructed, were accessible from the mezzanine level and rather than opening to another room, opened out to a sixteen foot drop to the plant below. The doors contained no markings, no warning signs of any type and only locked from the outside. Regardless of whether the lock on the outside was actually used, the way the doors were designed and constructed, they could always be opened from the inside.

Merrick Mechanical carried workers compensation coverage and made workers compensation payments to and on behalf of the Petitioner. Respondent did not make any workers compensation payments to Petitioner or on his behalf. In fact, there is no evidence that Respondent carried worker's compensation insurance for the benefit of Petitioner.

What is clear in this matter is that Respondent permitted an extraordinarily dangerous condition to exist on its premises and subjected its employees, as well as any other individuals who were on the premises of the plant, to an extreme risk of danger. Despite its wholly negligent acts, Respondent has no common law tort liability. Petitioner was left with no redress for the injuries he sustained. This is in violation of the Kentucky Constitution §§14 and 54 and the due process clause of the United States Constitution.

The Kentucky Constitution §14 provides that all Courts shall be open and every person shall have remedy by due course of law for the injuries done to him in lands, goods, person or reputation. Further § 54 of the Kentucky Constitution provides that the general assembly cannot limit the amount to be recovered for injuries to person. Petitioner's right to receive redress for the injuries he sustained due to the negligent acts of Respondent has been wholly circumvented as a result of KRS §§342.610 and 342.690.

When statues have been passed by our legislature that limit or eliminate an individuals right to redress for the damages he has suffered, our courts have summarily held them unconstitutional. *Ludwig v. Johnson*, 243 Ky. 5434, 49 S.W.2d 347 (1932); *Happy v. Erwin*, Ky, 330 S.W.2d 412 (1959). Despite these constitutional provisions and applicable case law, the Court of Appeals affirmed the District Court's opinion.

The statutes in issue deprive an individual of a right or remedy without a corresponding benefit. Respondent is not required to make any payments to Petitioner however Petitioner is prohibited from bringing a cause of action against

Respondent for the injuries he sustained due to Respondent's negligence.

A vested right was taken away from Petitioner without any corresponding benefit bestowed. Such a result is contrary to the provisions of the Kentucky Constitution and the due process clause of the U.S. Constitution.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____
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APPENDIX A

RECOMMENDED FOR FULL- TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed December 9, 1999]

No. 98-5518, 5585, 5613

ANTHONY THOMPSON; LIBERTY MUTUAL INSURANCE COMPANY *Plaintiffs - Appellants/ Cross-Appellees*	)
v.	)
THE BUDD COMPANY *Defendant Appellee/ Cross-Appellant*	)
BARTON-MARLOW COMPANY, INC.; ALBERT KAHN ASSOCIATES, INC. *Defendants - Appellees*	)
MERRICK MECHANICAL, INC. *Third Party Defendant-Appellee.*	)

Court of Appeals Opinion - 12/9/99

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 96-00036 - Joseph M. Hood, District Judge.

Before: MERRITT arid CLAY, Circuit Judges; WISEMAN*, District Judge.

OPINION

THOMAS A. WISEMAN, District Judge. Anthony Thompson ("Thompson"), a Merrick Mechanical, Inc. ("Merrick") employee, sustained serious injuries while working at The Budd Company's ("Budd") Shelbyville, Kentucky manufacturing plant. Thompson sued Budd alleging common law tort claims. The district court entered summary judgment for Budd, finding that Budd qualified as a "contractor" under Kentucky Workers' Compensation law and that Budd was immune from liability. Thompson appeals the district court's decision that Budd is a "contractor."

Stemming from the same set of events, Budd brought common law indemnification claims against Barton-Marlow Company, Inc. ("Barton") and Albert Kahn Associates, Inc. ("Kahn") and brought contractual indemnity claims against Barton and Merrick. The district court noted that without legal liability there can be no indemnification. Because Budd was not liable to Thompson, the district court dismissed the

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* The Honorable Thomas A. Wiseman, United States District Judge for the Middle District of Tennessee, sitting by designation.

common law and contractual indemnification claims. Budd appeals.

We find that Budd is a contractor under Kentucky's Workers' Compensation system and AFFIRM the district court's summary judgment against Thompson. Because we find that contractual indemnification, unlike common law indemnification, does not require legal liability to a third party, we REVERSE in part the district court's entry of summary judgment against Budd.

I. FACTUAL AND PROCEDURAL BACKGROUND

Anthony Thompson, was an employee of Merrick Mechanical, Inc. Merrick had contracted with The Budd Company to maintain Budd's heating, ventilation, and air conditioning ("HVAC") system. In November 1995, Thompson was working at Budd's automobile part stamping plant. The plant contained a mezzanine level electrical substation. This substation was a restricted area; it remained locked to ensure limited access. Within this area was a set of double doors which opened to the plant floor – sixteen feet below the mezzanine level.

Chuck Cummings ("Cummings"), another Merrick employee, was generally responsible for maintaining Budd's HVAC system. The day prior to Thompson's injury, Cummings had requested and received Thompson's aid in changing filters and filter frames. Thompson also helped Cummings the next morning. When they ran out of filters, Cummings and Thompson went to obtain more. The filters were stored in the mezzanine level electrical substation. Cummings unlocked the substation entrance giving Thompson

access to the substation. Thompson was unfamiliar with the area and the, plant design. While searching for the stored filters, Thompson opened the double doors and fell sixteen feet to the plant floor. Injuries resulting from the fall left him a paraplegic. Since then Thompson has received workers compensation payments through Merrick.

Anthony Thompson originally filed a negligence claim in the Shelby Circuit Court of Kentucky on 19 March 1996. Thompson sued Budd for failing to provide a safe working environment. On the basis of diversity jurisdiction, Budd removed the case to the United States District Court for the Eastern District of Kentucky, Frankfort Division, on 16 April 1996. Thereafter, Thompson amended the complaint to include as defendants Barton, who constructed the facility, and Kahn, who provided engineering and consulting services to Barton. Thompson alleged that Barton and Kahn failed to design and construct a safe working environment that complied with all applicable laws and regulations. Budd filed cross claims against Barton, Kahn, and Merrick.

In March of 1997, Budd filed a Motion for Summary Judgment against Thompson. After oral argument on this motion in July, 1997, the district court granted Budd's motion for summary judgment. Thompson filed a notice of appeal to this court on 18 August 1997. Finding that the order entering judgment against Thompson was not final because of Budd's pending indemnity claims, this Court dismissed the appeal for lack of jurisdiction.

On remand the district court entered a final order dismissing Budd's claims for indemnity against Barton, Kahn, and Merrick. Thereafter, Thompson, Budd, and intervening

plaintiff Liberty Mutual Insurance Company filed notices of appeal to this Court.

On 18 July 1997, Thompson entered into a settlement agreement with Barton and Kahn which resolved Thompson's claims against these two defendants. In accordance with the settlement agreement, Thompson agreed to defend Barton and Kahn against Budd's remaining claims.

II. DISCUSSION

We review de novo the district court's grant or denial of summary judgment. *See DePiero v. City of Macedonia,* 180 F.3d 770, 776 (6th Cir. 1999). We, thus, consider whether there are any issues of material fact and, if not, whether Budd is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *DePiero,* 180 F.3d at 776. Additionally, in reviewing summary judgment decisions we view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.* (citing *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). The district court ultimately dismissed Budd's indemnity claims for failure to state a claim. Since the court considered affidavits and matters outside the pleadings, the dismissal is treated as a summary judgment. *See* Fed. R. Civ. P. 12(c).

The lynchpin of the district court's resolution of this case is the holding that Kentucky Workers' Compensation law immunizes Budd from liability for Thompson's injuries. We, therefore, first address Budd's argument that Kentucky's Workers' Compensation system shields it from Thompson's

common law tort claims. Only after addressing this issue can we address Budd's various claims for summary judgment.

A. Kentucky Workers' Compensation and Immunity from Common Law Tort

Analysis of Budd's motion for summary judgment depends on the meaning of two provisions of the Kentucky Workers' Compensation law. *See* Ky. Rev. Stat. Ann. §§ 342.610(2)(b) and 342.690(1) (Banks-Baldwin 1997). Section 342.610(2)(b) defines "contractor" as a"person who contracts with another . . . [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person." Section 342.690(1) provides in relevant part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

Kentucky law, thus, makes clear that if Budd is a contractor then it has no liability in tort to Thompson, an employee who

has received compensation through Budd's subcontractor. *See United States Fidelity & Guar. Co. v. Technical Minerals, Inc.*, 934 S.W.2d 266, 267 (Ky. 1996); *Daniels v. Louisville Gas and Elec. Co.*, 933 S.W.2d 821,823 (Ky. Ct. App. 1996). Under this regime, Budd's claim raises one basic issue: whether Budd is a contractor.[1] Budd qualifies as a contractor if it contracted to have Merrick "perform[] work of a kind that is a regular or recurrent part of the work of the trade, business, occupation or profession of such person." *See* Ky. Rev. Stat. Ann. § 342.610(2)(b). No one disputes that HVAC maintenance was regular or recurring; the disagreement centers around whether such maintenance qualifies as "part" of Budd's "work of the trade, business, occupation or profession." *See id.*

Although Kentucky cases have not mapped precisely the contours of section 342.610, they do provide useful guidance to the meaning of "regular or recurrent part of the work of the trade, business, occupation or profession." Kentucky case law is clear that activities beyond one's primary business objective may qualify under section 342.610. For example, "rough carpentry" is a regular or recurrent part of the work of the building construction business, even if the contractor never performed rough carpentry with its own employees. *See Fireman's Fund Ins. Co. v. Sherman & Fletcher,* 705 S.W.2d 459,462 (Ky. 1986).

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[1] Thompson attempts to raise a second issue: whether Budd has secured payment of compensation as the workers' compensation system requires. Budd has clearly met this requirement; the Department of Workers' Claims of Kentucky has certified that Budd has complied with the Workers' Compensation Act as a self-insurer.

Additionally, emissions testing required by the EPA constitutes a regular or recurring part of a coal fired electric plant's business. *See Daniels v. Louisville Gas and Elec. Co.*, 933 S.W.2d 821, 824 (Ky. Ct. App. 1996). The *Daniels* court implied that the mandatory nature of the testing sufficed to establish the necessary connection to the company's business. *Id.*

The Sixth Circuit also has had several opportunities to consider the relationship between the alleged contractor's business and the employee's actions. *See, e.g., Granus v. North Am. Philips Lighting Corp.*, 821 F.2d 1253 (6th Cir. 1987). The plaintiff in *Granus* was injured after falling at the defendant's manufacturing plant. *See id.* at 1254. Plaintiff was engaged in a project "to refurbish and upgrade a glass-melting installation, or 'tank' at the plant." *Id.* at 1254-55. Specifically, the plaintiff operated the saw which cut the firebricks that were used to line the furnace. *See id.* at 1255. The court held that "[t]he evidence established that furnaces at glass factories are rebricked periodically as a matter of maintenance routine." *Id.* The Court concluded, "The relining of furnaces, required periodically as a matter of regular maintenance, is . . . a 'recurrent' part of the manufacturing business in which defendant . . . is engaged." *Id.* at 1258.

Given this case law, "part of . . . the business of such person" incorporates more than the primary task of Budd's company. Its business of "stamping automotive parts," therefore, may include more than the actual assembly line production of auto parts. As *Granus* and *Daniels* indicate, respectively, section 342.610 encompasses regular maintenance of manufacturer's physical plant as well as

activities required to conform with applicable governmental regulations. It is undisputed that changing the air conditioning filters was a regular element of Budd's plant maintenance. Although, perhaps, more remotely related to the stamping of auto parts than the lining of furnaces is to glass production, Budd's HVAC system plays an important role in its manufacturing process. Budd points to the winter 1995 temporary shutdown of one of its production lines due to an improperly functioning HVAC system. Thompson neither disputes nor offers an alternative explanation for this shutdown; the general proffer of statements that the HVAC system primarily serves climate control for the comfort of Budd employees simply fails to raise a triable issue of fact. Budd's claim that the Kentucky Building Code required a properly functioning HVAC system also supports the conclusion that Thompson's activities for Budd on the day of his injuries fall within section 342.610. *See Daniels,* 933 S.W.2d 821. Thus, the district court properly concluded that, for purposes of Kentucky Workers' Compensation, Budd is a contractor and cannot be held liable in tort for Thompson's injuries.

B. Workers' Compensation and the Kentucky Constitution

Thompson next argues that sections 342.610 and 342.690 combine to limit common law tort liability in violation of sections 14 and 54 of the Kentucky Constitution. Section 14 of the Kentucky Constitution provides, "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Section 54 provides, "The General

Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

In prior cases, Kentucky courts have addressed the constitutionality of its workers' compensation system and found that it meets constitutional muster. In so holding, Kentucky courts have concluded that the General Assembly did not limit the available recovery due an injury; rather, it provided a system by which persons could consent to limit the amount of recovery in exchange for greater certainty of recovery. Any limitations were agreed to and not imposed. *See Edwards v. Louisville Ladder,* 957 S.W.2d 290, 295 (Ky. Ct. App. 1997) (citing *Greene v. Caldwell,* 186 S.W. 648, 652 (Ky. 1916)). By initially proceeding through the workers' compensation system, Thompson waived his constitutional rights protected under sections 14 and 54 of the Kentucky Constitution. *See Edwards,* 957 S.W.2d at 295 (citing *M.J. Daly Co. v. Varney, Ky.,* 695 S.W.2d 400, 403 (Ky. 1985), *overruled on other grounds by Technical Minerals, Inc.,* 934 S.W.2d at 269)). Thompson's constitutional claims are without merit.

C. Indemnity

In addition to moving for summary judgment against Thompson, Budd also moved for summary judgment as to its indemnity claims against Merrick, Barton, and Kahn. The district court denied Budd's motion for summary judgment on the basis that the claims were due to be dismissed. The court reasoned that without liability there can be no indemnity -- whether based in the common law or in contract. Thus, the district court dismissed all claims. In the alternative, the

court denied the summary judgment motion because of unresolved issues of material fact. Budd asserts claims for contractual indemnity against Merrick and Barton and claims for common law indemnity against Barton and Kahn. Although the district court treated the common law and contractual indemnity claims alike, Kentucky distinguishes them. Following Kentucky law, we treat these claims separately. We will first address Budd's common law claims for indemnity and then Budd's contractual claims for indemnity.

1. The Common Law Indemnity Claims Against Barton and Kahn

In 1987 the Supreme Court of Kentucky addressed the common law right to indemnity in *Crime Fighters Patrol v. Hiles,* 740 S.W.2d 936 (Ky. 1987). In *Crime Fighters,* the underlying claim involved an assault on a customer, Hiles, at a White Castle restaurant. Hiles claimed that White Castle knew of the assailant's violent propensities, yet failed to protect him. The restaurant filed a third party suit against its security firm, Crime Fighters Patrol, alleging that they breached their contract by failing to keep order. The court noted that the common law provided White Castle and Crime Fighters Patrol complete indemnity from the assailant if they could prove that he was more to blame (at greater fault) than they for Hiles' injuries. *See Crime Fighters,* 740 S.W.2d at 939. The *Crime Fighters* court brought the common law right of indemnity into fuller relief by looking to the equitable principle of restitution:

> Where a person has become liable with another for harm caused to a third person because of

> his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other, . . . he is entitled to restitution from the other for expenditures properly made in the discharge of such liability.

Crime Fighters, 740 S.W.2d at 940 (quoting Restatement of Restitution § 95 (1937)).

In essence, we have a very similar situation before us. Budd alleges that Barton and Kahn bear greater responsibility for the dangerous condition – if any – at Budd's Shelbyville plant. The *Crime Fighters* rule seems to apply to the case at hand, except for the first clause – "Where a person has become liable." In addressing Kentucky's common law indemnity claim, courts have repeatedly recognized liability as a prerequisite. *See, e.g., Clark v. Hauck Mfg. Co.,* 910 S.W.2d 247, 253 (Ky. 1995) ("Indemnity is not an issue until fault has been determined. . . . There can be no indemnity without liability."); *Poole Truck Line, Inc. v. Commonwealth,* 892 S.W.2d 611,614 (Ky. Ct. App. 1995) ("Both indemnity and contribution depend upon liability by one or both parties to the original claimant who suffered the original loss. Without such liability, there is no independent right to indemnity or contribution."). In general, then, a party cannot recover under a common law indemnity claim if it has not

been held liable to a third party.[2] Budd is not liable to Thompson; thus, Budd's common law indemnity claims fail.

To the extent that Budd's common law indemnity claims also involve claims for attorney fees, they fail as well. Generally, each party is responsible for its own attorney fees and expenses. *See Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 147 (Ky. 1991). The *Nucor* court noted, however, that exceptions to this general role apply where equity indicates that attorney fees should be indemnified. *Id.; see also, Chittum v. Abell,* 485 S.W.2d 231, 237 (Ky. Ct.

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[2] Some courts have interpreted Kentucky common law to allow indemnity claims despite the failure to show legal liability. In *Long v. Illinois Cent. Gulf R. R. Co.*, 660 F. Sup. 469 (W.D. Ky. 1986), the district court concluded that Kentucky law does not require an actual judgment to be rendered before a claim of indemnity can succeed. *Id.* at 472. *Long* addressed a claim of indemnity by a party who had settled with the injured worker. Although an actual judgment may not be required, the court did require "one seeking indemnity to show that his liability was certain, and that there was no impediment or defense to the claim against him." *Id.* at 472. Budd is certainly not asserting that its liability to Thompson is certain; thus, even this possible exception to the rule requiring liability to have attached does not apply. We will not extend this exception beyond the context in which it was announced: a case where a party has settled a claim and seeks indemnification for the cost of settlement. The *Long* court did note that if a claim for liability is brought against a party --e.g., Budd – such defendant may maintain an indemnity action in conjunction with the principal suit at least until the resolution of the underlying liability claim. If the defendant is found not liable, then the common law indemnity claims must be dismissed as well. *See Long*, 660 F. Supp. at 473-74.

App. 1972). The *Chittum* court specifically stated that attorney fees may "be allowed in the judgment of indemnity for the damages." *Id.*, 485 S.W.2d at 237. *Chittum* indicates that liability for the underlying claim is also a prerequisite for a common law indemnity claim for attorney fees. Thus, the district court properly denied Budd's motion for summary judgment and dismissed Budd's common law indemnity claims (including attorney fees) for failure to state a claim.

2. The Contractual Indemnity Claims

Budd's motion for summary judgment also alleged contractual bases for its indemnity claims. Kentucky law provides that "[t]he nature of an indemnitor's liability under an indemnity contract shall be determined by the provisions of the indemnity agreement itself." *United States Fidelity, & Guar. Co. v. Napier Elec. & Constr. Co., Inc.*, 571 S.W.2d 644, 646 (Ky. Ct. App. 1978). Under *Napier*, parties may contractually provide for indemnification for – among other things – the costs incident to a potential legal liability as well as for the legal liability itself.[3] We now decide whether Budd

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[3] The cases which the district court cited as requiring liability for both contractual and common law indemnity relate only to common law indemnification claims. *See Long*, 660 F. Supp. at 471 (stating that Kentucky recognizes common law indemnity); *Harris Corp. v. Comair, Inc.*, 510 F. Supp. 1168, 1174 (E.D. Ky. 1981) (stating that plaintiff has no right to indemnity under common law principles); *see also Crime Fighters Patrol*, 740 S.W.2d at 938 (noting that both contractual and common law indemnity arise in this case, but that appellants did not contest the contractual indemnity in this case). The court also mentions *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 253 (Ky. 1995). The opinion

contracted with Merrick and Barton for indemnification for its legal expenses in defending the suit brought by Thompson irrespective of whether liability has been imposed on Budd.

a. Budd's claims against Merrick

Budd and Merrick argue that three different documents represent their contractual agreement: (1) Purchase Order 94-06004 ("First Purchase Order"); (2) Purchase Order 94-06539 ("Second Purchase Order"); and (3) Budd's Quotation Request Form ("Bid Request"). In terms of their actual indemnity language, which contract controls is immaterial because each indemnity provision has the same legal effect as to the events in question. Paragraph fourteen on the reverse side of both the First Purchase Order and the Second Purchase Order contains the following language:

> Seller [Merrick] agrees to indemnify, defend and hold harmless the Buyer [Budd] . . . and [defend][4] from and against any and all demands, actions, causes of actions, suits, costs, fees, penalties, damages (consequential and otherwise), attorneys' fees and all other

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in *Clark* is unclear whether contractual or common law indemnity claims are involved.

[4] Budd's brief quotes the contract as stating "and demand from and against." Although the copies of the agreement are not very clear, the agreement actually seems to provide "and demend [sic] from and against." It appears that an "m" was mistakenly used in the place of an "f." Additionally, "defend" simply makes more sense in this context than does "demand."

> liabilities and obligations whatsoever ("Losses") arising out of or relating to:
> (a) personal injuries, damages or death to any natural person . . . which relates to, in whole or part, (i) any manufacturing, design, or other defect, failure to warn, improper handling, and improper operating installation or other act or omission of Seller with respect to any of the Products or (ii) the performance by Seller of any services. . . .

The language in this contract is very broad; it requires indemnification not only for penalties and damages but also for suits, costs, attorney fees, and all other liabilities and obligations. As the contract provides, only where the costs or attorney fees are "clearly shown to have resulted solely and directly from [Budd's] gross negligence or willful misconduct" can Merrick avoid liability under either one of these contractual provisions.

The Bid Request also contains indemnity language; its language, however, differs from the indemnity provision just quoted. Specifically, paragraph seventeen on the reverse side of the Bid Request provides as follows:

> Seller agrees to indemnify and protect Buyer against all liabilities, claims or demands for injuries or damages to any person or property arising out of any labor performed on Buyer's premises by Seller under this contract or out of any use by Seller or Buyer's tools or equipment, including any legal fees or cost incurred by Buyer in connection therewith.

This provision, like the purchase order indemnity provisions, is very broad; it provides for indemnity not only for legal liabilities but also for costs associated with mere claims or demands as well as legal fees. Although not as clear as the language in the purchase orders, the Bid Request indemnity provision would also require Merrick to indemnify Budd for Budd's negligence. *See Fosson v. Ashland Oil & Ref Co.*, 309 S.W.2d 176 (Ky. 1958). In *Fosson,* the court considered a contract with indemnity language similar to the Bid Request:

> The Contractor shall indemnify the Owner against all claims, demands, liens, taxes, loss or damages of any character suffered by the Owner and shall save the Owner harmless from all liability growing out of or incurred in the prosecution of said work or arising from any operations, acts, or omissions of Contractor.

Id. at 177. The court construed such language to include indemnity for the owner's negligence. *See Id.* at 178. The court expressly refused to require a specific statement to the effect that indemnity "include[s] the owner's own negligence." *Id.* The court noted, "we can hardly envision a more inclusive indemnity provision." *Id.* The *Fosson* court also relied on the fact that the contractor was required to carry insurance satisfactory to the owner. *Id.* The Bid Request, immediately after the indemnity provision, allows Budd to require Merrick to prove the level of its insurance coverage -- indicating that Budd had a vested interest in Merrick's insurance. *Fosson* compels us to find that the Bid Request contract includes indemnification for Budd's own negligence.

Thus, as to their meaning, which indemnity provision controls is immaterial.

Merrick next seeks to raise a genuine issue of material fact by challenging the legal validity of the indemnity provisions in particular contracts. First, Merrick argues that the Second Purchase Order is unsigned, thus making its indemnity provision unenforceable if the Second Purchase Order controls.[5] For support in this claim, Merrick looks to

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[5] A review of the two purchase orders reveals very few differences. There are, however, some differences – even between the two copies of the second purchase order contained in the joint appendix. The parties, however, point to no substantive differences. Nonetheless, without further fact finding it is unclear whether the contracts are identical. If there are no substantive differences, then there is only one contract memorialized on two purchase orders. Merrick signed one recording of the contract and should not be able to point to a second unsigned copy lo negate its prior acceptance.

Kentucky Revised Statutes 371.010(4)[6] and 342.690(1).[7] Under these provisions, an indemnity provision generally must be in writing and signed by the indemnitor. The Court of Appeals of Kentucky, however, has noted that "if one promises to pay the debt of another in order to further some purpose of his own, . . . such promise is not within" section 371.010(4). *Barnett v. Stewart Lumber Co.*, 547 S.W.2d 788, 790 (Ky. Ct. App. 1977). In this case, Merrick agreed

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[6] Section 371.010(4) provides "No action shall be brought to charge any person . . . [u]pon any promise to answer for the debt, default, or misdoing of another . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence." Ky. Rev. Stat. Ann. § 371.010(4) (Banks-Baldwin 1997).

[7] Section 342.690(1) provides in relevant part, "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner." Ky. Rev. Stat. Ann. § 342.690(1) (Banks-Baldwin 1997).

to indemnify Budd as part of its consideration for being awarded the maintenance service contract. Because Merrick agreed to indemnify Budd in order to advance its own purpose, Merrick cannot seek cover under Kentucky's statute of frauds. Similarly, section 342.690(1) provides no relief for Merrick. This statute merely requires that the contract be written. In this case, the Second Purchase Order is written and specifically provides for acceptance by performance or signature. Moreover, Merrick admits that it has a history of including indemnity provisions in its contracts with Budd. Both the explicit language of the statute and the equities of the situation prevent the conclusion that section 342.690(1) would invalidate the Second Purchase Order's indemnity provision.

Finally, Merrick seeks to raise a genuine issue of material fact as to which contract controls by arguing that the First Purchase[8] Order improperly incorporates its indemnity provision. Merrick's argument does not raise a genuine issue of material fact. Merrick claims that Kentucky law requires language incorporating provisions from the back of a contract "be conspicuous by being in larger or other contrasting type or color." *Hertz Commercial Leasing Corp. v. Joseph,* 641 S.W.2d 753, 756 (Ky. Ct. App. 1982). Merrick, however, gives too much weight to *Hertz;* subsequent cases apply a lower standard. In *Bartlett Aviation, Inc. v. Dry Lake Coal Co., Inc.*, 682 S.W.2d 796 (Ky. Ct. App. 1985), the court of appeals noted that *Hertz* relied on case law addressing a

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[8] Merrick makes no claims as to the incorporating language of the Bid Request or the Second Purchase Order. The equities of the situation, however, would demand the same result as to each alleged contract.

provision seeking to limit implied warranties – a provision which the law requires to be "conspicuous," that is, to be in larger or contrasting type. *See Bartlett,* 682 S.W.2d at 798. The *Bartlett* court addressed an arbitration provision and concluded that when the incorporating language is above a contractor's signature, "we know of no case law or statutes which require that the incorporation language for the arbitration provision be stated in bold type or in any unusual form." *Id.* In another arbitration clause case, Kentucky likewise required that the incorporating language merely be plain and clear. *See Home Lumber Co. v. Appalachian Reg'l Hosps., Inc.,* 722 S.W.2d 912, 914 (Ky. Ct. App. 1987).

Although the issue in this case is an indemnity provision as opposed to an arbitration provision, the distinction is immaterial. The first purchase order contains the following incorporating provision:

> THE SELLER IN ACCEPTING THIS ORDER AGREES TO ALL TERMS AND CONDITIONS SET FORTH ON THE FACE AND REVERSE HEREOF ALL OF WHICH ARE MADE PART OF THIS ORDER[.]

This language is undoubtably clear. The fact that the this language is in a smaller font – albeit in all capitals – than much of the rest of the contract is immaterial. In every alleged contract between Merrick and Budd – including the bid request – the indemnity provision is on the reverse side of the purchase order. Merrick has acknowledged that indemnity provisions of some sort were included in past contracts. Thus, Merrick cannot now claim that it was

unaware that the provisions on the reverse side of the purchase order were part of the contract.

Despite the fact that Merrick has failed to establish a material issue of fact as to which contract covers Thompson's injuries, summary judgment must be denied. As the district court noted, genuine issues of material fact remain as to whether Budd was grossly negligent or engaged in willful misconduct which led to Thompson's injuries. This issue must be remanded for further factual determinations.

b. Contractual Indemnity Claims against Barton

Article 25 of the contract between Budd and Barton contains the following indemnification clause:

> With regard to the work to be performed hereunder by the contractor on the owner's premises, contractor agrees to and will indemnify and hold harmless owner from and against any claims, losses, or damages due to the death of or injury to the person or the property of any person, or persons arising out of, or in connection with, contractor's performance hereunder, except as to any such loss or damage which is caused by the sole negligence, or wanton and willful misconduct of owner or owner's agents, servants or employees.

The first issue is whether such a clause includes attorney fees. *In United States v. Hardy,* 916 F. Supp. 1385 (W.D. Ky.

1996), the United States District Court for the Western District of Kentucky addressed a contract that provided indemnity for "any and all loss, damage, injury, liability, and any claim or claims therefor, including claims for injury or death to any and all persons or property." *Id.* at 1390. The court awarded attorney fees based on this contract, but two qualifications must be noted. First, liability had already attached. *See Hardy,* 916 F. Supp. at 1388 (noting that indemnitee had already paid the United States for CERCLA liability). Second, the court noted that award of attorney fees was not automatic but based on equitable distinctions. *See id.* at 1391 n.5.

Applying *Hardy,* the language "against any claims, losses, or damages" encompasses more than legal liability (i.e., damages). It is not dispositive that Budd, unlike the indemnitee in *Hardy,* has not been held liable in the underlying claim. *See Napier,* 571 S.W.2d 644. In *Napier,* the court of appeals found indemnity proper although there had been no judicial determination of liability where the contract provided indemnification for "all 'liabilities, losses and expenses' incurred by the appellant, including all amounts paid by appellant 'in good faith under the belief that: (1) Surety was or might be liable therefore; (2) Such payments were necessary or advisable to protect any of Surety's right or to avoid or lessen Surety's liability or alleged liability.['] " *Napier,* 571 S.W.2d at 645. Considering *Napier* In conjunction with *Hardy* leads to the conclusion that the contract between Barton and Budd allows – but does not require – a court to award attorney fees despite the absence of liability unless Budd was defending claims that arise out of its "sole negligence, or wanton and willful misconduct."

Because Kentucky applies comparative negligence principles, Barton argues that by definition Thompson's claim was for Budd's sole negligence. Kentucky case law has not specifically interpreted the meaning of "loss or damage caused by the sole negligence, or wanton and willful misconduct" as an exception to an indemnification contract. Michigan courts, however, have construed a statute which bars indemnification for "damages arising out of bodily injury to persons . . . caused by or resulting from the sole negligence of the promisee or indemnitee." *Burdo v. Ford Motor Co.*, 828 F.2d 380, 382 (6th Cir. 1987). In construing that statute, Michigan courts found that such language bars indemnity only where "'the "bodily injury" as a whole, results from the sole negligence of the indemnitee.'" *Id* at 384 (citing *Fischbach-Natkin v. Power Process Piping*, 403 N.W.2d 569, 574 (Mich. Ct. App. 1987)). Thus, even where comparative negligence regimes exist, an indemnitee may recover under the indemnity agreement as long as it was not 100% responsible for the plaintiff's injuries. *See generally Burdo*, 828 F.2d 380; *Paquin v. Harnischfeger Corp.*, 317 N.W.2d 279 (Mich. Ct. App. 1982). Although not binding, this interpretation is persuasive and imminently reasonable under Kentucky law.

Budd's attorney fee indemnity claims are remanded to the district court. The district court in its discretion may award Budd attorney fees based on its contract with Barton, unless the facts indicate that all of the injuries suffered by Thompson arose because of Budd's sole negligence, or wanton and willful misconduct.

III. CONCLUSION

For the reasons discussed above, the district court's grant of summary judgment in favor of Budd against Thompson is AFFIRMED; the award of summary judgment in favor of Barton and Kahn regarding Budd's common law indemnity claims is AFFIRMED; and the award of summary judgment in favor of Barton and Merrick regarding Budd's contractual indemnity claims is REVERSED as to Budd's claims for attorney fees. This case is remanded for proceedings consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed July 30, 1997]

No. 96-36

ANTHONY THOMPSON,
Plaintiff,

v.

THE BUDD COMPANY, et al.,
Defendants.

MEMORANDUM OPINION & ORDER

Anthony Thompson was an employee of Merrick Mechanical, Inc. ("Merrick") which had a contract with The Budd Company ("Budd") to maintain Budd's heating, ventilation and air conditioning system. While performing such work for his employer, Thompson fell sixteen feet from the mezzanine level of Budd's plant, sustaining severe injuries which have rendered him a paraplegic.

Thompson sued Budd alleging that it failed to provide him a safe working environment. The matter is before the

Court on Budd's motion for summary judgment. After considering the oral and written arguments of the parties, the Court considers Budd's motion to be well-made in light of *U.S. Fidelity & Guar. Co. v. Technical Minerals Inc.*, 934 S.W. 2d 266, 269 (Ky. 1996), *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W. 2d 459, 461-462 (Ky. 1986); *Granus v. North American Phillips Lighting Corp.*, 821 F. 2d 1253, 1257-1258 (6th Cir. 1987); and *Foothills Rural Telephone Cooperative Corp., Inc. v. United, Inc.*, Pikeville Civil Action No. 95-382 (E.D. Ky. March 13, 1997) (Hood, J.).

Accordingly,

IT IS ORDERED that Budd's motion for summary judgment be and the hereby is, **GRANTED.**

IT IS FURTHER ORDERED that Thompson's complaint be, and the same hereby is, **DISMISSED WITH PREJUDICE.**

This the 30th day of July, 1997.

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Joseph M. Hood, Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed April 6, 1998]

No. 96-36

ANTHONY THOMPSON, ET AL.,
Plaintiffs,

v.

THE BUDD COMPANY, ET AL.,
Defendants.

JUDGMENT

In conformity with the Memorandum Opinion and Order of even date,

IT IS ORDERED that this matter be, and the same hereby is, **DISMISSED** and **STRICKEN** from the Court's active docket, as all issues have been resolved in this matter. This is a final and appealable Order and there is no just cause for delay.

This the 6th day of April, 1998.

/s/_____
JOSEPH HOOD, JUDGE

Date of Entry and Service:

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THE ORDER OF JUDGMENT
ON 4-6-89, LESLIE G. WHITMER, CLERK
BY:/s/_____
C. Dearborn, D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed April 6, 1998]

No. 96-36

ANTHONY THOMPSON, ET AL.,
Plaintiffs,

v.

THE BUDD COMPANY, ET AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

The defendant, The Budd Company ("Budd"), has moved the Court for summary judgment regarding its claim for contractual and common law indemnity against the defendants, Barton-Malow, Inc. ("Barton-Malow") and Albert. Kahn Associates, Inc. ("AKA") and the third-party defendant, Merrick Mechanical, Inc ("Merrick"). The defendants, third-party defendant, and intervening plaintiff, Liberty Mutual Insurance Company ("Liberty Mutual") , have responded. This matter is ripe for consideration.

FACTUAL BACKGROUND

The plaintiff, Anthony Thompson ("Thompson"), was an employee of the third-party defendant, Merrick, who had a maintenance contract with the defendant, Budd, to maintain Budd's heating, ventilation, and air conditioning ("HVAC") system. Thompson was injured when he fell sixteen (16) feet from Budd's mezzanine level substation, when attempting to retrieve some air filters.

Generally, Chuck Cummings ("Cummings"), another Merrick employee, was assigned the duty of maintaining Budd's HVAC system; however, just prior to the accident, Cummings had requested that Merrick provide him additional help. Acknowledging Cummings' request, Merrick assigned Thompson to Budd's facility as well.

On the day of the accident, Thompson was helping Cummings replace filters and filter frames as he had done the day before. This was his second day working with Cummings at Budd's plant; he had only worked the previous day under Cummings' direct supervision, replacing filters and filter frames.

On that day, Cummings and Thompson ran out of filters. Thus, in order to continue with their job, they had to obtain more filters. The filters were kept in the electrical substation on the mezzanine floor.

This electrical substation was a restricted area. It was kept locked so as to ensure limited access. Cummings, who was familiar with the substation, unlocked the door and allowed Thompson into the area. Within this area was a set

of double doors, which opened to the plant floor sixteen (16) feet below. Thompson, being unfamiliar with the area and the plant design, opened those doors while searching for the filters and fell to the floor below.

Thompson was severely injured by the fall; he is now a paraplegic. This lawsuit, in which Thompson seeks damages for his injuries, followed.

Thompson sued Budd, alleging that Budd was negligent in failing to provide a safe working environment for him. He also sued Barton-Malow, who constructed the Budd facility, and AKA, who provided engineering and consulting services to Barton-Malow, claiming that these defendants failed to design and construct a safe working environment that complied with all applicable laws and regulations.

Budd initially moved the Court for summary judgment, claiming that it could not be held liable for Thompson's injuries as it is excluded from liability under the worker's compensation "exclusivity" doctrine. KRS 342.690. The Court agreed.

Construing Kentucky law, the Court held that Budd is a contractor and Merrick is a subcontractor. The Court determined that the HVAC system is an integral part of Budd's business and thus is considered to be a regular and recurrent part of Budd's business pursuant to KRS 342.610. See Silvers v. Martin County Coal Corp., 849 F.2d 1473 (6th Cir. 1988)(unpublished opinion)(finding that siding a coal facility is necessary for the maintenance of the coal operations and thus was a regular part of the business); U.S. Fidelity & Guar. Co. v. Technical Minerals, Inc., 934 S.W.2d 266, 269

(Ky. 1996); Daniels v. Louisville Gas & Elec. CO., 933 S.W.2d 821, 823-24 (Ky. Ct. App. 1996); see also Granus v. North American Philips Lighting Corp., 821 F.2d 1253, 1257-58 (6th Cir. 1987); cf. Morlan v. Green River Steel Corp., 35 F.3d 566 (6th Cir. 1994)(unpublished disposition) (holding that Green River was not a contractor under KRS 342.610 and that Morlan's employer, PPM, was an independent contractor). Accordingly, since Budd is a contractor, it is excluded from liability pursuant to KRS 342.690, even if it did not itself pay the worker's compensation benefits. See Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 461 (Ky. 1986).

Budd now moves the Court for summary judgment on its contractual and common law claims for indemnity. Budd argues that Thompson's injuries were a result of (1) Merrick's negligence in failing to supervise and train Thompson and (2) Barton-Malow's and AKA's negligence in designing and constructing the Budd plant. According to Budd, due to these parties' negligence, Budd has incurred costs and attorney's fees and possibly will be liable to Thompson if the Sixth Circuit determines that Thompson's liability claim against it was not barred by the Kentucky worker's compensation "exclusivity" doctrine. Hence, Budd seeks judgment as a matter of law, holding these parties responsible for Thompson's injuries and requiring them to indemnify Budd for any damages and costs and expenses incurred as a result of this litigation.

Barton-Malow, AKA, Merrick and Liberty Mutual have all responded. In sum, these parties argue that Budd is not entitled to summary judgment, first and foremost, because Budd has not been determined liable. They also argue that

Budd is partly responsible for Thompson's injuries regardless of whether they were negligent. Thompson sued Budd for its negligence in using the substation contrary to the use for which the substation had been designed, i.e. the substation was not suppose to be used for storage of air filters. Thus, according to Barton-Malow, AKA, Merrick and Liberty Mutual, Budd was negligent in its own right, regardless of its derivative negligence due to the alleged improper design and construction of its facility.

CONCLUSIONS OF LAW

Looking at the arguments provided, the Court finds that it cannot grant summary judgment to Budd. First, from the record provided, the Court cannot determine as a matter of law whether Barton-Malow, AKA and/or Merrick were negligent and caused Thompson's injuries; there appear to be factual issues which need to be resolved by the jury on the issues of negligence and apportionment of fault. Thus, the Court cannot determine if Budd is entitled to indemnification for the fault of these parties until such fault can be determined at trial. Accordingly, Budd's motion for summary judgment on this basis is premature.

Moreover, a question remains as to whether Budd's own allegedly negligent acts caused Thompson's injuries. Assuming, then, that the contracts allowed for indemnification for its own negligence, as Budd argues, the Court cannot determine whether Budd would be entitled to indemnification for its own allegedly negligent acts. Thus, again Budd's motion for summary judgment on this basis is premature.

Regardless, however, pursuant to the Court's Memorandum Opinion and Order of July 30, 1997 [Record No. 196], granting Budd summary judgment pursuant to Kentucky's worker's compensation "exclusivity" doctrine, Budd cannot be held liable for Thompson's injuries under Thompson's tort claim.[9] Since Budd can not been held liable, then, Budd is not entitled to indemnification and the Court cannot grant it summary judgment. See Clark v. Hauck Mfg. Co., 910 S.W.2d 247, 253 (Ky. 1995)("There can be no indemnity without liability."); see also Long v. Illinois Central Gulf R.R. Co., 660 F. Supp. 469, 472 (W.D. Ky. 1986) (citing Ashland Oil & Refining Co. v. General Tel. Co., 462 S.W.2d 190 (Ky. 1970)) (stating that to recover on a claim of indemnity, the indemnitee must be "legally liable" and "compelled at law to pay the claim"); Harris Corp., Data Communications Div. v. Comair, Inc., 510 F. Supp. 1168, 1174 (1981) (stating that "indemnity arises 'where one of two persons who are liable for a tort discharges the liability of both.'"), aff'd, 712 F.2d 1069 (6th Cir. 1983).

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[9] Budd did not incur any costs of its own for Thompson's injuries, because Merrick paid the worker's compensation benefits; the only costs that Budd has had to incur has been the costs and attorney's fees expended in this litigation. Attorney's fees and cost are generally not awarded by the court. See, e.g., Nucor Corp. v. General Elec. Co., 812 S.W.2d 136, 137 (Ky. 1991). However, if under the contractual provisions, the Court were to find that Budd was entitled to indemnification for its attorney's fees and costs, the Court would certainly not award the full amount of $187,424.41, when Budd could have minimized such expenses by filing a motion to dismiss early on in the course of litigation.

Accordingly, with the Court being sufficiently advised,

IT IS ORDERED herein as follows:

(1) Budd's motion for summary judgment be, and the same hereby is, **DENIED**.

(2) All issues having been resolved in this matter, this matter be, and the same hereby is, **DISMISSED** and **STRICKEN** from the Court's active docket.

(3) A final judgment will be entered contemporaneously herewith.

This the 6th day of April, 1998.

/s/_____
JOSEPH HOOD, JUDGE

Date of Entry and Service:

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 11, 2000]

Nos. 98-5518, 5585, 5613

ANTHONY THOMPSON; LIBERTY MUTUAL INSURANCE COMPANY	)
Plaintiffs - Appellants Cross-Appellees	)
v.	)
THE BUDD COMPANY	)
Defendant Appellee Cross-Appellant	)
BARTON-MAR LOW COMPANY, INC.; ALBERT KAHN ASSOCIATES, INC.	)
Defendants - Appellees Defendants	)
MERRICK MECHANICAL, INC.	)
Third Party Defendant-Appellee	)

ORDER

BEFORE: MERRITT, CLAY, Circuit Judges and WISEHAN, District Judge[1]

Upon consideration of the petitions for rehearing filed by the plaintiffs,

It is **ORDERED** that the petitions for rehearing be, and they hereby are, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

[1] The Honorable Thomas A. Wiseman, United States District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX E

342.610 Liability for compensation; builder's proof of coverage required for issuance of building permit; notice required to be posted by employers.

* * *

(2) A contractor who subcontracts all of part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

(a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or

(b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person

shall for the purpose of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

* * *

342.690 Exclusiveness of liability.

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wire, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. . . .

* * *